

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

RICHARD BLANCHARD,

Plaintiff(s),

v.

JP MORGAN CHASE BANK, et al.,

Defendant(s).

2:11-CV-1127 JCM (PAL)

ORDER

Presently before the court is defendant Quality Loan Services Corp.'s second motion to dismiss. (Doc. # 41). Defendants Mortgage Electronic Registration Systems, Inc., MERSCORP, Inc., and US Bank have joined Quality Loan's motion. (Docs. # 43, 45).¹ Plaintiff Richard Blanchard filed an untimely opposition to defendants' motion, (doc. # 48), and defendants replied (docs. # 49, 50, 51).

Also before this court is plaintiff's motion for an order to show cause. (Doc. # 62). Defendants have responded, (docs. # 65, 67, 68), and plaintiff has replied (doc. # 70). Also before the court is plaintiff's motion for leave to amend complaint. (Doc. # 63). Defendants have responded, (docs. # 64, 66, 69), and plaintiff has replied (doc. # 71).

I. Background

Plaintiff Richard Blanchard is the owner of property located at 2503 Vegas Vic Street,

¹ This constitutes all defendants in this action as JP Morgan Chase was terminated from this action on July 10, 2012, for plaintiff's failure to effect timely service pursuant to FRCP 4(m).

Henderson, Nevada. (Doc. # 1-2, 4). The property was financed through the execution of a note and deed of trust promising to repay \$360,000.00 in monthly installments to the Mortgage Store of Denver. (Doc. # 7-1).² On September 8, 2006, the deed of trust was recorded. (Doc. # 7-1). On September 26, 2006, the Mortgage Store of Denver recorded an assignment in favor of JP Morgan Chase Bank. (Doc. # 7-2).

On March 30, 2010, plaintiff filed a voluntary Chapter 7 bankruptcy petition. (Doc. # 7-3). On October 29, 2011, an order terminating an automatic stay as to the property was filed. (Doc. # 7-3). On December 8, 2011, plaintiff's Chapter 7 bankruptcy was closed.

On November 15, 2010, JP Morgan Chase Bank recorded an assignment of the deed of trust in favor of Mortgage Electronic Systems, Inc. ("MERS"). (Doc. # 7-4). On February 4, 2011, MERS recorded an assignment of the deed of trust in favor of Fannie Mae. (Doc. # 7-5).

On February 14, 2011, Fannie Mae recorded a substitution of trustee and appointed Quality Loan Services Corp. as the foreclosure trustee. (Doc. # 7-6). On February 18, 2011, Quality Loan recorded a notice of default and election to sell. (Doc. # 7-7). On June 2, 2011, Quality Loan recorded a notice of sale, scheduling a sale for June 23, 2011. (Doc. # 7-8). The sale was postponed.

On June 9, 2011, plaintiff filed this action in state court. (Doc. # 1-2). On July 7, 2011, defendants removed the action to this court. (Doc. # 1).

II. Motions

A. Motion to dismiss (doc. # 41)

i. Dismissal pursuant to 7-2

Pursuant to Local Rule 7-2(d), an opposing party's failure to file a timely response to any motion constitutes the party's consent to the granting of the motion and is proper grounds for dismissal. *U.S. v. Warren*, 601 F.2d 471, 474 (9th Cir. 1979). However, prior to dismissal, the district court is required to weigh several factors: "(1) the public's interest in expeditious resolution

² Defendants request that the court take judicial notice of exhibits attached to their second motion to dismiss. (Doc. # 41). Under Fed. R. of Evid. 201, a court may judicially notice matters of public record. *Mack v. S. Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986); *see also Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 866 n.1 (9th Cir. 2004). Therefore, the court takes judicial notice of these public records.

1 of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4)
 2 the public policy favoring disposition of cases of their merits; and (5) the availability of less drastic
 3 sanctions.” *Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (citing *Henderson v. Duncan*, 779 F.2d
 4 1421, 1423 (9th Cir. 1986)).

5 Here, plaintiff failed to file a timely response to defendants’ motion to dismiss. (*See* doc. #
 6 46). Plaintiff filed his response 3 days late. The court does not take lightly litigants’ failure to
 7 observe local rules and court orders; however, given plaintiff’s pro se status the court moves to the
 8 merits of defendants’ motion.

9 **ii. Legal standard**

10 A court may dismiss a plaintiff’s complaint for “failure to state a claim upon which relief can
 11 be granted.” FED. R. CIV. P. 12(b)(6). A properly pled complaint must provide “[a] short and plain
 12 statement of the claim showing that the pleader is entitled to relief.” FED. R. CIV. P. 8(a)(2); *Bell*
 13 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed factual
 14 allegations, it demands “more than labels and conclusions” or a “formulaic recitation of the elements
 15 of a cause of action.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citation omitted).

16 “Factual allegations must be enough to rise above the speculative level.” *Twombly*, 550 U.S.
 17 at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to
 18 “state a claim to relief that is plausible on its face.” *Iqbal*, 129 S.Ct. at 1949 (citation omitted).

19 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply when
 20 considering motions to dismiss. First, the court must accept as true all well-pled factual allegations
 21 in the complaint; however, legal conclusions are not entitled to the assumption of truth. *Id.* at 1950.
 22 Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not
 23 suffice. *Id.* at 1949.

24 Second, the court must consider whether the factual allegations in the complaint allege a
 25 plausible claim for relief. *Id.* at 1950. A claim is facially plausible when the plaintiff’s complaint
 26 alleges facts that allows the court to draw a reasonable inference that the defendant is liable for the
 27 alleged misconduct. *Id.* at 1949.

1 Where the complaint does not permit the court to infer more than the mere possibility of
 2 misconduct, the complaint has “alleged – but not shown – that the pleader is entitled to relief.” *Id.*
 3 (internal quotations omitted). When the allegations in a complaint have not crossed the line from
 4 conceivable to plausible, plaintiff’s claim must be dismissed. *Twombly*, 550 U.S. at 570.

5 The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d 1202,
 6 1216 (9th Cir. July 25, 2011). The *Starr* court stated, “First, to be entitled to the presumption of
 7 truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of
 8 action, but must contain sufficient allegations of underlying facts to give fair notice and to enable
 9 the opposing party to defend itself effectively. Second, the factual allegations that are taken as true
 10 must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party
 11 to be subjected to the expense of discovery and continued litigation. “*Id.*”

12 Generally, a district court may not consider any material beyond the pleadings in ruling on
 13 a Rule 12(b)(6) motion However, material which is properly submitted as part of the complaint
 14 may be considered on a motion to dismiss.” *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896
 15 F.2d 1542, 1555 n.19 (9th Cir.1990) (citations omitted). Similarly, “documents whose contents are
 16 alleged in a complaint and whose authenticity no party questions, but which are not physically
 17 attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss” without
 18 converting the motion to dismiss into a motion for summary judgment. *Branch v. Tunnell*, 14 F.3d
 19 449, 454 (9th Cir. 1994). Under Fed. R. Evid. 201, a court may take judicial notice of “matters of
 20 public record.” *Mack v. S. Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the
 21 district court considers materials outside of the pleadings, the motion to dismiss is converted into
 22 a motion for summary judgment. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925
 23 (9th Cir. 2001).

24 **iii. Discussion**

25 Defendants contend that plaintiff is judicially estopped from bringing his prepetition causes
 26 of action due to failure to disclose these causes of action during his bankruptcy proceeding. All of
 27 plaintiff’s claims, with the exception of the third cause of action for wrongful foreclosure, the eighth
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1 cause of action for quiet title, the tenth cause of action for injunctive relief, and the fourteenth cause
2 of action for negligent infliction of emotional distress, are based on allegations of predatory lending
3 occurring at the time the loan was originated. The loan at issue in those causes of action originated
4 prior to the filing of the bankruptcy petition.

5 At the commencement of bankruptcy, a debtor must disclose all of his assets to be included
6 in the bankruptcy estate for the potential benefit of creditors. 11 U.S.C. § 521(1); *see also* Cusano
7 v. Klein, 264 F.3d 936, 945–46 (9th Cir. 2001). The bankruptcy estate includes all the debtor’s
8 potential claims or causes of action that existed at the time he or she filed for bankruptcy. 11 U.S.C.
9 § 541(a)(1); *see also In re Swift*, 129 F.3d 792, 795 (5th Cir.1997); *In re Coastal Plains, Inc.*, 179
10 F.3d 197, 208–208 (5th Cir. 1999) (“[i]t goes without saying that the Bankruptcy Code and Rules
11 impose upon bankruptcy debtors an express, affirmative duty to disclose all assets, including
12 contingent and unliquidated claims.”) (*italics in original*). A debtor need only have “knowledge
13 enough of the facts to know that a cause of action exists during the pendency of the bankruptcy.”
14 *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 783 (9th Cir. 2001).

15 A party’s failure to disclose causes of action results in judicial estoppel. “[I]n the bankruptcy
16 context, a party is judicially estopped from asserting a cause of action not raised in a reorganization
17 plan or otherwise mentioned in the debtor’s schedules or disclosure statements.” *Id.* at 783; *see also*
18 *Hay v. First Interstate Bank of Kalispell*, 978 F.2d 555, 557 (9th Cir. 1992); *Coastal Plains*, 179
19 F.3d at 208 (debtor is barred from bringing claims not disclosed in its bankruptcy schedules); *Oneida*
20 *Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 419 (3d Cir. 1988) (debtor’s failure to list
21 potential claims against a creditor “worked in opposition to preservation of the integrity of the
22 system which the doctrine of judicial estoppel seeks to protect,” and debtor was estopped by reason
23 of such failure to disclose).

24 In this case, there is no dispute that plaintiff failed to disclose his prepetition causes of action
25 in his bankruptcy matter. Plaintiff had knowledge of the facts, *Hamiton*, 270 F.3d at 783, that
26 underlie his prepetition claims for predatory lending practices. That is, plaintiff had knowledge of
27 the facts that underlie his unfair lending practices cause of action (NRS 598(D)), his deceptive trade
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practices cause of action, his conspiracy to commit fraud and conversion cause of action, his conspiracy to commit fraud related to MERS system cause of action, his inspection and accounting cause of action, breach of good faith and fair dealing cause of action, his declaratory relief cause of action, his rescission cause of action, his violation of the Fair Housing Act (42 U.S.C. § 3601, et seq.) claim, and his Financial Exploitation of Older Persons (NRS 200.5092(2), 200.5092(5), and 657) cause of action.

Thus, the court finds that plaintiff is judicially estopped from bringing the above referenced claims. Finding that amendment would be futile, the court dismisses these causes of action with prejudice. *See Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995).

Further, the remaining causes of action relating to post-bankruptcy foreclosure have already been dismissed with prejudice. (*See* doc. # 44). Therefore, all fifteen causes of action in plaintiff's original complaint are dismissed with prejudice.

B. Motion for order to show cause (doc. # 62)

Plaintiff filed a motion for an order to show cause allowing for defendants to maintain foreclosure actions against plaintiff in violation of Nev. Rev. Stat. 107.086. This statute proscribes additional requirements for sale of owner-occupied housing under Nevada law.

Plaintiff is not entitled to an order to show cause because the causes of action relating to wrongful foreclosure have already been analyzed and dismissed with prejudice by this court.³ Thus, the court denies plaintiff's motion for an order to show cause.

C. Motion for leave to amend complaint (doc. # 63)

i. Legal standard

Plaintiff filed a motion for leave to amend his complaint. Federal Rule of Civil Procedure 15(a) provides that leave to amend "shall be freely given when justice so requires." The Supreme Court has interpreted Rule 15(a) and confirmed the liberal standard district courts must apply when

³ Further, plaintiff's complaint does not allege violation of Nev. Rev. Stat. 107.086. Further, the court denies plaintiff's motion to strike plaintiff's (doc. # 71) to strike defendants' reply (doc. # 65) to plaintiff's motion for order to show cause.

1 granting such leave. In *Foman v. Davis*, 371 U.S. 178 (1962), the Court explained: “In the absence
 2 of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of
 3 the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice
 4 to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc. – the
 5 leave sought should, as the rules require, be ‘freely given.’” *Id.* at 182. Thus, a district court should
 6 deny a motion to amend where the amendment is an “exercise in futility.” *Leadsinger, Inc. v. BMG*
 7 *Music Pub.*, 512 F.3d 522, 532 (9th Cir. 2008).

8 A proposed amendment is futile if no set of facts can be proved under the amendment that
 9 would constitute a valid claim or defense. *Farina v. Compuware Corp.*, 256 F.Supp.2d 1033, 1061
 10 (9th Cir. 2003) (quoting *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988)). A
 11 proposed amendment to a complaint that merely restates and seeks to reinstate claims that already
 12 have been dismissed may be properly denied as futile. *Ross v. City of Waukegan*, 5 F.3d 1084 (7th
 13 Cir. 1993).

14 In addition, leave to amend may be denied if a court determines that “allegation of other facts
 15 consistent with the challenged pleading could not possibly cure the deficiency.” *Abagninin v.*
 16 *AMVAC Chemical Corp.*, 545 F.3d 733, 742 (9th Cir. 2008) (quoting *Schreiber Distrib. Co. v.*
 17 *Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986)). The futility analysis determines
 18 whether the proposed amendment would survive a challenge of legal sufficiency under Fed R. Civ.
 19 P. 12(b)(6). *Miller*, 845 F.2d at 214.

20 In addition to the Rule 15(a) requirements, the local rules of federal practice in the District
 21 of Nevada require that a plaintiff submit a proposed, amended complaint along with a motion to
 22 amend. LR 15-1(a).

23 **ii. Discussion**

24 Here, plaintiff has complied with Local Rule 15-1 and submitted an amended complaint
 25 along with his motion to amend. (Doc. # 63). While the court acknowledges the extreme liberality
 26 Rule 15 proscribes as to granting leave to amend, the court finds that amendment would be futile
 27 here. *See Leadsinger, Inc.*, 512 F.3d at 532. The court has already dismissed with prejudice several
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1 of the causes of action plaintiff seeks to re-allege (first cause of action for quiet title, second cause
 2 of action for aiding/abetting wrongful foreclosure,⁴ third cause of action for wrongful foreclosure,
 3 ninth cause of action for unjust enrichment, tenth cause of action for injunctive relief, fourteenth
 4 cause of action for negligent infliction of emotional distress). (*See* doc. # 44). Thus, plaintiff has
 5 been foreclosed from alleging these causes of action against these defendants.

6 Further, the court has dismissed with prejudice plaintiff's prepetition causes of action.
 7 Although plaintiff's causes of action in his amended complaint are different from those in the
 8 original complaint, the same principal applies: "a party is judicially estopped from asserting a cause
 9 of action not raised in a reorganization plan or otherwise mentioned in the debtor's schedules or
 10 disclosure statements." *Hamilton*, 270 F.3d at 783. Those causes of action in plaintiff's amended
 11 complaint that arose prepetition are plaintiff's fifth cause of action for unlawful reliance on falsified
 12 documents against property rights (NRS 107.080), thirteenth claim for violation of the Fair Housing
 13 Act (42 U.S.C. § 3601), and plaintiff's fifteenth cause of action for Financial Exploitation of Older
 14 Persons (NRS 41.1395 , 200.5092(2), 200.5092(5), 657.220-270). Since some of these causes of
 15 action have already been determined to be judicially estopped (thirteenth and fifteenth causes of
 16 action) and some are similar in nature to those being judicially estopped (fifth cause of action) the
 17 court finds that amendment as to these causes of action inappropriate.

18 Lastly, the court finds that amendment would be futile as to the remaining causes of action:
 19 plaintiff's fourth cause of action for unlawful (statutorily defective) foreclosure proceedings (NRS
 20 107.080), plaintiff's sixth cause of action for false recordation concerning title and transfers to real
 21 property, plaintiff's seventh cause of action for broken chain of custody (promissory note &
 22 assignment rights), plaintiff's eighth cause of action for cancellation of instruments, plaintiff's
 23 eleventh cause of action for declaratory relief, and plaintiff's twelfth cause of action for slander of
 24 title. Having reviewed the proposed amended complaint, the court finds that these causes of action
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27 ⁴ The court recognizes that wrongful foreclosure was dismissed with prejudice, (doc. # 44); however, a cause
 28 of action for aiding/abetting wrongful foreclosure is derivative of wrongful foreclosure.

1 would not likely survive a challenge of legal sufficiency under Fed. R. Civ. P. 12(b)(6). *See Miller*,
2 845 F.2d at 214.

3 Thus, the court denies plaintiff's motion for leave to amend his complaint as to all causes of
4 action in plaintiff's proposed amended complaint.

5 **III. Conclusion**

6 Accordingly,

7 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendants second motion
8 to dismiss (doc. # 41) be, and the same hereby is, GRANTED. These prepetition causes of action are
9 dismissed with prejudice.

10 IT IS FURTHER ORDERED that plaintiff's motion for an order to show cause (doc. # 62)
11 be, and the same hereby is, DENIED.

12 IT IS FURTHER ORDERED that plaintiff's motion for leave to amend complaint (doc. #
13 63) be, and the same hereby is, DENIED.

14 DATED October 18, 2012.

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18 **UNITED STATES DISTRICT JUDGE**